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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6918 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE RAVI R. TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHARATKUMAR SHANTILAL BARBHAIYA

Versus

CHIEF ADMINISTRATIVE OFFICER

Appearance:

MR PH PATHAK for Petitioner

MR.CHAUHAN for MR.DEEPAK V PATEL for Respondent No.1& 2

CORAM : MR.JUSTICE RAVI R. TRIPATHI

Date of decision: 02/03/2001

ORAL JUDGEMENT

1. The present petition is filed by the petitioner, claiming to have joined the service of the respondent Department on 1-1-1989 in the circle office under the

Superintending Engineer, as Karkoon. The time scale of pay payable to the regular Karkoon is Rs.950-1500. The case of the petitioner is that he was not paid the said pay-scale, but he was paid only Rs.20.50 as daily wage. It is also contended that the petitioner was not granted the benefits of weekly off and, therefore, the petitioner was getting salary for 24-26 days in a month. That he was also given break in service to avoid his right of continuous service in October, 1989. It is also the case of the petitioner that he was re-designated as "Xerox Operator" in fixed salary, though during that period also the petitioner was performing all the duties of Karkoon, over and above the duties of "Xerox Operator". Again from July, 1990, the petitioner was employed as Karkoon and from fixed salary, he was paid the salary on daily wage basis. The case of the petitioner is that as the other employees approached this Court, the petitioner was terminated without following any procedure of law from March, 1991. With these averments, the prayer of the petitioner is:

"to issue an order, direction, writ in the nature of mandamus and/or certiorari or any other appropriate writ or direction, declaring the impugned practice adopted by the respondents to give an artificial break in the service of the petitioner as arbitrary, illegal, unconstitutional and be pleased to quash and set aside the same and direct the respondents to consider the petitioner in continuous service and grant all consequential benefits."

The other reliefs prayed for are:

"9(B) be pleased to declare that there is no justification available to the respondents for giving such artificial break in the service of the employee and further hold that the petitioner who is daily wage employee cannot be replaced by the other daily rated employee as held by the Hon'ble Supreme Court;

9(C) be pleased to direct the respondents to absorb the petitioner as regular employee of the respondent department and further direct the respondents to grant the benefits of equal pay for equal work to the petitioner from his initial date of appointment, with 18% interest; and

9(D) be pleased to declare that the petitioner is entitled to get the benefits of equality of

pay during the period when he was employed by the respondent either as a Clerk or as Class IV employee."

2. The affidavit-in-reply is filed by B.J.Vasavada, Executive Engineer, respondent No.2, who has said that the facts set out by the petitioner are not true and in fact, the petitioner was engaged in the month of January, 1989 as Office Boy for miscellaneous work on purely adhoc basis on daily rate wage basis due to exigency of work in the office and he worked as Office Boy upto September, 1989. It is also said in the affidavit in reply that since there was no regular work in the office of the Executive Engineer from October, 1989, the petitioner was engaged on part-time rate basis and he was being paid his wages on hour's basis and he continued as part-time worker upto February, 1991. The affidavit-in-reply proceeds further to state that from March, 1991 to December, 1991, the petitioner was not working for the respondent Board and that from January, 1992, the petitioner was again engaged as Office Boy for miscellaneous work in the office of the Public Health Works Division at Jamnagar on daily rate basis on purely adhoc basis. The details were set out about the working for the petitioner during the months of January and February, 1992, to which the petitioner worked as Office Boy for 41 days only. Thereafter, again from March, 1992 to June, 1992 i.e. for a period of four months, the petitioner was not in the employment of the respondent Board and it was only in the month of July, 1992 that the petitioner was given work of watchman and he worked as watchman till September, 1992. Thereafter, from September, 1992, he continued in service as watchman in view of the interim order passed by this Court. Looking to the averments in the petition and looking to the averments made in the affidavit-in-reply, there is no doubt that the matter involves highly disputed questions of facts and this Court cannot go into these questions under Article 226 of the Constitution of India.

3. At this stage, Mr.Pathak, learned Advocate, places reliance upon the judgement of the Division Bench of this Court passed in Special Civil Application Nos.3547, 5100 of 1991, 6414 and 6415 of 1992, decided on 13th/14th July, 1993 (Coram: S.D.Shah and R.D.Vyas, J.J.). Mr.Pathak pointed out that against this judgement, the respondent Board had approached the Hon'ble Supreme Court by filing Special Leave to Appeal (Civil) No.4650/1995, which was dismissed on 21st September, 1995. Mr.Pathak submitted that the Division Bench, after taking into consideration various aspects,

has decided the question as to whether the daily rated employees being employed by the respondent Board can be denied the minimum time scale of pay, which is being paid to the regular employees, discharging similar work and performing similar duties, more particularly when on completion of five years' service as daily rated employees, such daily rated workers are conferred upon the benefit of minimum time-scale of pay (Emphasis supplied). The Division Bench has observed that the Hon'ble Supreme Court of India, in the case of State of Hariyana Vs. Piara Singh and Ores., has laid down at Para 28 of the judgement, which is reproduced below:

"State of Hariyana Vs. Piara Singh & Ores., reported in 1992 (4 SCC) 118 applied the formula of 3 years, as that period is regarded as 'reasonable' at the end of which a person can be said to have gathered sufficient experience and when he performs the same duties and work which is being performed by a regular employee, the doctrine of equal pay for equal work can be said to have been attracted and such classes of employees must, therefore, get the benefit which the regular employees get."

4. Mr.Pathek submitted that the Division Bench has directed the respondent Board to give benefits of time scale to the daily rated employees on their completion of three years' service and not on completion of five years' service.

5. Mr.Chauhan, learned Advocate, appearing on behalf of the respondent Board submitted that after the interim order was granted by this Court in July 1993, the petitioner was appointed in service as watchman, and he was given the benefit of circular dated 17-10-1988 on completion of five years. Further, he submitted that he is not able to give the exact date from which the benefit is given. If the respondent Board has deemed fit to give the benefit to the petitioner on completion of five years, though the petitioner continued in service under the order of this Court. It is clear that the respondent Board is not contending that the petitioner, while discharging the duties as watchman under the order of this Court, was not discharging the similar duties to that of a regular watchman. During the Course of the argument, Mr.Chauhan was called upon to produce the material, if he has any, to show that the petitioner, while discharging his duties as watchman, was not discharging the similar duties as that of a regular watchman. As is natural, Mr.Chauhan sought time for producing such material which this Court has declined to

grant.

6. The question before this Court is short and simple. If the Board itself has decided to give the benefit of time scale on completion of five years, why the same should not be given on completion of three years as directed by the Division Bench of this Court. I am in full agreement with the reasoning given by the Division Bench, set out in para 27 of the judgement, and for the reasons recorded therein, the benefit is to be given on completion of three years.

7. Mr.Chauhan, learned Advocate submitted that as the facts of the present case are different, the contentions are different, the challenge is different, and the prayers are also different, the decision of the Division Bench has no application to the present case. I am afraid that the submission is not only misdirected, but also misconceived inasmuch as the ratio of the decision of the Division Bench, which is sought to be applied is not depended on the facts, which are sought to be pressed into service. The ratio of the judgement is that once the Board decides to give the benefit of time scale on completion of five years, the same should have been given on completion of three years. Since the Board has already exercised its discretion and has conferred the benefits on completion of five years, there is no reason as to why the Board should not implement the judgement of this Court rendered by the Division Bench in its true spirit and should not give the benefits to the petitioner on completion of three years.

8. The learned Advocate, Mr.Chauhan, submitted that the present application is based on the facts that the respondent was giving the artificial breaks in the service of the petitioner and that the prayer was that the artificial breaks should not be given. So far the prayer regarding artificial breaks should not be given is concerned, that does not survive inasmuch as after September 1992, the petitioner has continued in service and that the respondent Board has granted the benefits of circular dated 17-10-1988 on completion of five years. Therefore, only question which is now remaining to be considered by this Court is, after the judgement of Division Bench, wherein the Division Bench has considered the period of five years to be unreasonable and has directed the respondent Board to give benefit of time scale on expiry of three years, is required to be followed by the respondent Board. Mr.Chauhan then submitted that in the present case the petitioner is not able to establish that he was discharging the same work

and on account of no such fact being established, he should not be given the benefit of equal pay for equal work. The contention raised by Mr.Chauhan is misplaced in as much as the respondent Board has already granted the benefit of the circular dated 17-10-1988 to the petitioner on completion of fives years, though the Board is directed to give such benefits to the employees on completion of three years in the aforesaid judgement by the Division Bench. The learned Advocate further submitted that it is not the case of the petitioner that, on account of his having discharged the same functions as that of a regular watchman, that he should be given the equal pay as that of the regular watchman. It is surprising to note that the respondent Board, having treated the petitioner at par with the regular watchman on completion of five years, has already given the benefit to the petitioner. If this Court was to pass an order of regularization in favour of the petitioner starting from January, 1989, the day on which the petitioner claims to have joined the service of the respondent Board and that, too, in the post of Karkoon, then the submissions made by Mr.Chauhan would have some substance, but in the facts and circumstances of the case, the submissions of Mr.Chauhan do not warrant any cognisance and the same are rejected.

9. Mr.Chauhan then submitted that in the present case, the petitioner has not prayed for the relief which is sought to be granted by this Court and there are no pleadings supporting that prayer under Article 226 of the Constitution of India.

10. The question of claiming equal pay for equal work does not arise in the present case inasmuch as the only relief which is granted in this case is that the benefit on completion of five years should be granted on completion of three years and for that no such pleadings are required.

11. Mr.Chauhan relied upon the judgement of the Hon'ble Apex Court in the case of "West Bengal and Others Vs. Bhowal and Others" reported in (1994) 4 SCC Page 78 (Para 9). Mr.Chauhan submitted that the Hon'ble Apex Court has held in the said judgement that "in public services, the nature of work in two services or in the same service, the nature of the work of the two groups may be more or less the same. But merely on that ground, they are not entitled to the same scale of pay." The Judgement of the Hon'ble Apex Court has no application to the facts of the present case. Mr.Chauhan is not able to point out anything to show that the duties discharged by

the petitioner as a watchman while working under the order of this Court were, in any manner, different from the duties performed by the watchman regularly appointed by the respondent Board.

12. The next decision which is relied on by the learned Advocate is in the matter of "State of U.P. and others Vs. J.P.Chaurasia and Others" reported in AIR 1988 SC Page 19. The Hon'ble Apex Court has observed it as under in para 17 of the judgement:

"The first question regarding entitlement to the pay scale admissible to Section Officers should not detain us longer. The answer to the question depends upon several factors. It does not just depend upon either the nature of work or volume of work done by Bench Secretaries. Primarily it requires among others, evaluation of duties and responsibilities of the respective posts. More often functions of two posts may appear to be the same or similar, but there may be difference in degrees in the performance. The quantity of work may be the same, but there may be difference in degrees in the performance. The quantity may be different that cannot be determined by relying upon averments in affidavits of interested parties. The equation of posts or equation of pay must be left to the Executive Government. It must be determined by expert bodies like Pay Commission. They would be the best judge to evaluate the nature of duties and responsibilities of posts. If there is any such determination by a Commission or Committee, the Court should normally accept it. The Court should not try to tinker with such equivalent unless it is shown that it was made with extraneous consideration."

13. The reliance placed on this decision is misplaced in asmuch as the relief which is sought to be granted is in view of the impugned order of the Division Bench of this Court.

14. Mr.Chauhan also placed reliance on the decision of the Hon'ble Apex Court in the matter of "State of Haryana and Others Vs. Jasmer Singh and Others", reported in the AIR 1996(11) S.C.C. page 77. Mr.Chauhan submitted that the law laid down by the Hon'ble Apex Court in the aforesaid judgement is that, "daily rated workman cannot be equated with the regular workman for the purpose of their wages, nor can they claim the minimum of the regular pay of the regularly employed workman." The aforesaid judgement, too, cannot be said to have any application to the facts of the present case inasmuch as it is not this Court who has directed the

respondent Board to give the petitioner the benefit of the circular dated 17-10-88. The respondent Board has already granted the benefit to the petitioner, though the petitioner was in employment under the order of this Court, on completion of five years and what is said to be agitated by the petitioner is that the Division Bench of this Court has already said that the period, mentioned in the said circular, that of five years, on completion of which benefits are to be given to the persons like the petitioner, is unreasonably long and the benefits should be given on completion of three years.

15. Mr.Chauhan also relied upon the decision of the Hon'ble Apex Court in the case of "Rhone-Poulenc (India) Ltd. Vs. State of U.P. and Others", reported in (2000) 7 SCC page 675. Mr.Chauhan submitted that under Article 226, this Court shall not interfere beyond the subject-matter of the writ petition. Thereafter, he submitted that the Hon'ble Apex Court has observed in the aforesaid case that if the High Court interferes beyond the subject-matter of the writ petition, such additional findings are outside the subject-matter of the award and of the writ petition and also are premature and impermissible. As narrated herein above, what is sought to be granted to the petitioner is the benefits which are already granted by the respondent Board, should be now granted to the petitioner, on completion of three years, rather than on completion of five years.

16. In the result, in view of the aforesaid discussion, the respondent Board is directed to grant the benefits of Circular dated 17-10-1988 by treating the petitioner to have become entitled to the same on completion of three years. No other prayers are granted. The petition is accordingly allowed to the aforesaid extent only. Rule is made absolute to the aforesaid extent. No order as to costs.

2-3-2001 (Ravi R. Tripathi, J.)

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